

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

FEB 23 1999

IN THE MATTER OF:

DOCKET NUMBER: 95-01269

COUNSEL: NONE

HEARING DESIRED: YES

APPLICANT REQUESTS THAT:

His nonselection for promotion to the grade of major by the CY94A Central Major Board, which convened on 22 Aug 94, be set aside.

The Promotion Recommendation (PRF), AF Form 709, prepared for consideration by the CY94A Central Major Board, which convened on 22 Aug 94, be declared void and removed from his records.

He be directly promoted to the grade of major as though selected by the CY94A Central Major Board, which convened on 22 Aug 94.

By amendment, he be reinstated to active duty, with return of all pay, allowances, and entitlements which were denied to him.

APPLICANT CONTENDS THAT:

The Management Level Evaluation Board (MLEB) used illegal procedures in the PRF process. MLEBs may award only "Definitely Promote," "Promote," and "Do Not Promote This Board" recommendations. However, MLEBs in nearly every major command also awarded "command indorsements." This was contrary to the governing regulation (AFR 36-10) and not uniformly applied. As nearly all the commands used some type of command indorsement for the "special" promote recommendations, the impact on officers, who, like himself, received "legitimate" promote recommendations was indeed severe. Since the "special promote recommendations effectively "took away" promotions from officers who received legitimate "promote" recommendations, there was no way his record could compete on a fair and equitable basis.

His senior rater was not familiar with his daily performance. The result was a PRF that omitted several major accomplishments which were documented elsewhere in his record.

The selection boards which considered his record was held in violation of statute and Department of Defense (DOD) directive.

An SSB cannot resolve his promotion status. Not only are the benchmark records tainted by the illegalities of the original boards, the scoring procedure, itself, is arbitrary and capricious, as it imposes a higher standard for SSB selection than for original board selection.

In support of his appeal, the applicant provided a detailed personal statement and other documents associated with the matter under review.

STATEMENT OF FACTS:

Applicant was appointed a second lieutenant, Regular Air Force, on 1 Jun 83 and was voluntarily ordered to extended active duty on the same date. Information extracted from the Personnel Data System (PDS) indicates that the applicant is no longer on active duty. His Total Active Federal Military Service Date (TAFMSD) was 26 Jun 82.

Applicant's OER/OPR profile since 1984 follows:

<u>PERIOD ENDING</u>	<u>EVALUATION</u>
30 Nov 84	1-1-1
31 May 85	1-1-1
1 Dec 85	1-1-1
1 Dec 86	1-1-1
1 Dec 87	1-1-1
13 May 88	Training Report
15 Dec 89	Training Report
15 Dec 90	Meets Standards
15 Dec 91	Meets Standards
15 Dec 92	Meets Standards
# 15 Dec 93	Meets Standards
## 15 Dec 94	Meets Standards

Top Report - CY94A (22 Aug 94) Major Board.
Top Report - CY95A (5 Jun 95) Major Board.

AIR FORCE EVALUATION:

The Evaluation Boards Section, AFMPC/DPPPEB, reviewed this application and recommended denial. DPPPEB noted the applicant's allegations that he was unable to compete fairly for either a "Definitely Promote" or "Top 20%" statement at the Air Force Materiel Command (AFMC) evaluation board, that his senior rater was not familiar with his daily performance; and that illegal information was used at the MLEB which led to his nonselection for promotion to the grade of major by the CY94A Major Board.

DPPPEB indicated that with the diverse range of assignment locations and organizational configurations, it is not at all uncommon for a promotion candidate to have a senior rater they have not met or had personal contact with. This does not violate the spirit of the Officer Evaluation System (OES). Air Force directives do not require the senior rater to have personal knowledge of the ratee. Although the governing regulation states that the senior rater will be knowledgeable of the ratee's most recent duty performance, this information may be obtained from the record of performance, subordinate supervisors, or reliable sources of information. They have reviewed the contested PRF and determined that it was completed according to the directive and was in compliance with all regulatory requirements.

According to DPPPEB, there was no evidence presented to support the allegations of "illegal" information being considered in the PRF process. Also, there was no official evidence presented to support allegations of "special" promote recommendations being used to identify officers who should be selected for promotion by the Central Selection Board. There was no such rating system as a "special promote." However, in an effort to discriminate among officers who received "Promote" recommendations, some senior raters and MLEBs employed a technique not addressed in AFR 36-10 in which they used comments such as "my top promote" or "if I had one more 'Definitely Promote,' he would get it" and other comments to convey to the Central Selection Board how they rank-ordered officers. Promotion recommendations are clear signals to the promotion boards about the officers' duty performance, and how these officers compare to their peers within a clearly defined organization. It was never illegal for senior raters or MLEBs to rank order promotion eligibles. The recent review of the OES revalidated this practice; however, MLEBs were precluded from rank ordering eligibles to eliminate any negative perceptions that existed from the field.

In DPPPEB's view, the applicant has not provided any evidence that he was treated unfairly by the OES.

A complete copy of the DPPPEB evaluation is at Exhibit C.

The Selection Board Secretariat, AFPC/DPPB, reviewed this application and provided an advisory opinion addressing the applicant's contentions that the selection board which considered his record was held in violation of statute and Department of Defense (DOD) directive, and that the benchmark records are tainted and the SSB scoring system is arbitrary and capricious. In summary, DPPB indicated that the application contained faulty logic, incorrect statements, accusations without merit, directives, statutes, and regulations taken out of context, and was fully unfounded.

A complete copy of the DPPB evaluation is at Exhibit D.

The BCMR and SSB Section, AFPC/DPPPA, reviewed this application and recommended denial. DPPPA concurred with the assessments of DPPPEB and DPPB. DPPPA indicated that while it may be argued that the contested PRF was a factor in the applicant's nonselection, there was no clear evidence that it negatively impacted his promotion opportunity. Central boards evaluate the entire officer selection record (OSR). Therefore, they are not convinced the contested PRF was the sole cause of the applicant's nonselection.

According to DPPPA, an evaluation report is considered to represent the rating chain's best judgment at the time it is rendered. Once a report is accepted for file, only strong evidence to the contrary warrants correction or removal from an individual's record. The burden of proof is on the applicant. He has not substantiated the contested report was not rendered in good faith by all evaluators based on knowledge available at the time.

In DPPPA's view, insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice in regard to the applicant's request for direct promotion to the grade of major. An officer may be qualified for promotion, but, in the judgment of a selection board—vested with discretionary authority to make the selection—he may not be the best qualified of those available for the limited number of promotion vacancies. Absent clear-cut evidence the applicant would have been a selectee by the P0494A board, DPPPA believes a duly constituted board applying the complete promotion criteria is the most advantageous position to render this vital determination. The board's prerogative to do so should not be usurped except under extraordinary circumstances. Further, to grant a direct promotion would be unfair to all other officers who have extremely competitive records and also did not get promoted. Other than his own opinions, the applicant has provided no substantiation for his allegations. The burden of proof is on him. DPPPA does not support direct promotion.

A complete copy of the DPPPA evaluation, with attachment, is at Exhibit E.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

In his response, the applicant indicated that the evidence proves that his PRF was based on an incomplete record and was illegally precluded from containing key words which would have enhanced its quality; that his PRF should be upgraded to a "Definitely Promote" because it is the only recommendation which would allow his record to compete on a fair basis with officers who received illegal "Top Promote" recommendations; that the selection board process did not comply with statute; that an SSB cannot provide him full and fitting relief; and, that a direct promotion is

within the authority of the AFBCMR to recommend. Therefore, he should be directly promoted to the grade of major as if selected to the CY94 Major Board. (See-Exhibit G.)

ADDITIONAL AIR FORCE EVALUATION:

The Staff Judge Advocate, AFPC/JA, reviewed this application and recommended denial. JA indicated that, with respect to the alleged incomplete PRF, they could discern no legal issue and deferred to the other advisories. According to JA, the rest of the applicant's brief presented arguments familiar to the Board attacking as illegal various aspects of the Air Force's promotion recommendation and promotion board procedures. JA noted the applicant's claim that he was the victim of illegal MLEB procedures; that is, he challenged what he believed to be illegal, command indorsement special promote recommendations--alleging a system where stratification of "promote" recommendations occurred in violation of the existing regulation. In particular, the applicant stated that the "top promote" system was unauthorized, the system was not uniformly applied, and he was prejudiced by its use. In JA's view, the applicant failed to present relevant evidence of any error or injustice warranting relief.

A complete copy of the JA evaluation is at Exhibit H.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION:

In his response to the JA advisory opinion, the applicant indicated that, although it addressed both the illegal Officer Evaluation System (OES) and illegal promotion board aspects of his case, it did not provide an analysis of either. He indicated that the unrefuted evidence proves he was harmed by an illegal top promote system. The unrefuted evidence proves he was harmed by a central selection board process held contrary to law. The evidence proves an SSB offers no cure because the combination of the errors precludes relief. He asks the Board to correct his record to reflect selection to the grade of major as if selected by the CY94 Major Board, and, direct reinstatement to active duty with return of all pay, allowances, and entitlements which were denied to him as a result of the illegal activities in the AFMC evaluation system and the AF central promotion selection system.

Applicant's complete response and additional documentary evidence are at Exhibit J. In addition, the applicant provided a subsequent response, dated 18 Oct 97, with additional supporting documentation, which is at Exhibit K.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.
2. The application was timely filed.
3. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. The applicant's complete submission was thoroughly reviewed and his contentions regarding the contested PRF, his consideration for promotion by the selection board in question, and the promotion process in general, were duly noted. However, we do not find the applicant's assertions, in and of themselves, sufficiently persuasive to override the rationale provided by the Air Force offices of primary responsibility (OPRs) concerning these issues. Therefore, in the absence of sufficient evidence to the contrary, we agree with the recommendations of the OPRs and adopt their rationale as the basis for our decision that the applicant has failed to sustain his burden of establishing that he has suffered either an error or an injustice. Accordingly, we find no compelling basis to recommend granting the relief sought in this application.
4. The applicant's case is adequately documented and it has not been shown that a personal appearance with or without counsel will materially add to our understanding of the issues involved. Therefore, the request for a hearing is not favorably considered.

THE BOARD DETERMINES THAT:

The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.

The following members of the Board considered this application in Executive Session on 14 Oct 98, under the provisions of AFI 36-2603:

Mr. Thomas S. Markiewicz, Panel Chair
Mr. Charles E. Bennett, Member
Ms. Martha Maust, Member

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 3 Apr 95, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, AFMPC/DPPPBB, dated 12 Jul 95.
- Exhibit D. Letter, AFPC/DPPB, dated 15 Apr 96.
- Exhibit E. Letter, AFPC/DPPPA, dated 19 Apr 96.
- Exhibit F. Letter, SAF/MIBR, dated 6 May 96.
- Exhibit G. Letter, applicant, undated, w/atchs.
- Exhibit H. Letter, AFPC/JA, dated 9 Apr 97.
- Exhibit I. Letter, AFBCMR, dated 24 Apr 97.
- Exhibit J. Letter, applicant, dated 17 Jul 97, w/atchs.
- Exhibit K. Letter, applicant, dated 18 Oct 97, w/atchs.



THOMAS S. MARKIEWICZ
Panel Chair